

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

LOCAL 660, UNITED WORKERS OF AMERICA,

RESPONDENT UNION

**Case Nos. 29-CB-103994
29-CB-126867**

AND

LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION

CHARGING PARTY UNION

**LOCAL 660, UNITED WORKERS OF AMERICA
POST-HEARING BRIEF**

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PRELIMINARY STATEMENT

Local 660, United Workers of America, submits this post-hearing brief in support of its application to dismiss the pending proceeding on several grounds.

First, the National Labor Relations Board does not have jurisdiction over this matter, as it is one that falls within the purview of the Railway Labor Act and the National Mediation Board, as Alstate Maintenance Inc., is not an employer subject to the jurisdiction of the National Labor Relations Act. Furthermore, if Alstate Maintenance, Inc., is found to be an employer subject to the NLRA, in accordance with recent Board law, they are joint-employers with airline carriers and therefore are not subject to the National Labor Relations Act.

Second, the first charge the Board issued a complaint on is based on alleged violations that are outside the six (6) months statute of limitations and as a result should be dismissed outright. The case law on Section 10(b) of the NLRA is very specific and is designed in such a way as to not allow the Board to consider and/or prosecute charges relating to alleged violations occurring outside the six-month period when the charging party had prior actual or constructive knowledge of the violation. Furthermore, any charge that is “grounded in events predating the limitation period is directly at odds with the purposes of the 10(b) proviso.” For that reason alone the charge relating to the alleged unlawful recognition should be dismissed entirely.

Third, if the Board finds that this case does fall within the jurisdiction of the NLRB and is not subject to 10(b) dismissal, then the case should be dismissed as it relates to terminal one employees because Local 660, at the time of recognition had

majority support of the bargaining unit members in Terminal 1, as evidenced by the card check of 102 cards and the recognition agreement signed by both parties. It is Board policy to presume majority recognition when an employer voluntarily agrees to a recognition agreement, as they would not knowingly and willingly violate the law.

Fourth, the last alleged violation is that Local 660 unlawfully requested payment of dues, via a letter mailed March 2014, without previously informing the bargaining unit members of various right. However, this is completely inaccurate. Not only did Local 660 have a valid union-security provision, but they also provided the entire bargaining unit members with their *Beck* rights on Union membership applications. Moreover, even if the Board finds that the Union unlawfully requested dues none of the employees were terminated in accordance with the valid union-security provision as detailed in the March, 2014 letter.

STATEMENT OF CASE:

Local 660, United Workers of America (hereinafter "Local 660" and/or "Union") entered into a recognition agreement with Alstate Maintenance, Inc. (hereinafter "Employer" and/or "Alstate") on August 2, 2012 to represent "All full-time and regular part-time, skycaps, wheelchair agents, baggage handlers, passenger service agents, boarding gate agents and CTX baggage handlers" (hereinafter "bargaining unit") at Terminal 1 in JFK Airport, Jamaica, New York. Prior to entering into a valid recognition agreement the Union and the Employer had a priest perform a card count, wherein the priest declared and certified that the Union had 102 authorization cards, representing a majority of the employees in the

Bargaining Unit. Ensuing, by letter dated August 9, 2012, the Union informed the bargaining unit members that they are their exclusive collective-bargaining representative.

Subsequent to negotiations between the Union and the Employer, the two parties entered into a Collective Bargaining Agreement (hereinafter "CBA"), dated December 1, 2012. The bargaining unit within the CBA contained employees working in Terminal 1 and Terminal 4 at JFK Airport. The CBA contained a lawful union security provision, requiring bargaining unit members to become and remain members in good standing in the Union no later than thirty-one (31) days following their employment or execution, or effective date of CBA. Following the effective date in the CBA the Union obtained dues checkoff authorization and membership cards from members on or about February 2013. After, obtaining said dues checkoff authorization cards the Employer withheld dues from the bargaining unit members and remitted those dues to the Union.

After the initial dues where paid by the bargaining unit members, Local 32BJ, approximately ninth months after the recognition agreement, filed a charge against Local 660 claiming that Local 660 violated the National Labor Relations Act (hereinafter "Act") alleging Local 660 did not represent a majority of the people for which the Union was the exclusive-collective bargaining representative for. Thereafter, a subsequent charge was filed on April 16, 2014 regarding a request for payment of dues letter sent by Local 660. This letter was sent in relation to a valid union-security provision within the CBA. These two charges have been litigated together and are at issue in this case.

STATEMENT OF FACTS:

I. Jurisdiction:

During the course of the trial the General Counsel and Charging Party put forth several witnesses in an attempt to establish that the Board has jurisdiction over this matter. Several of the witnesses presented by the General Counsel are employees of the Employer and have no actual knowledge of the inner workings of the Employer but rather can only attest to their daily duties. The test for jurisdiction in this case is determined by whether the airline carriers have direct or indirect control of the Employer's operation. The material and relevant facts in relation to airline carrier control for the two Terminals as attained from the various witness testimony and exhibits are as follows:

a. Terminal 1:

i. Carrier control through contract:

- TOGA has the right to audit the number of hours and invoices charged by Alstate. GC-22
- Alstate has to get prior approval from TOGA management for overtime. GC-22
- Skycap and wheelchair managers at the start of everyday contact the airline carriers to determine number of wheelchairs required. GC-22
- Passenger service agents are responsible to provide support and assistance to passengers utilizing the Automated Passport Control (APC) kiosks, provide crowd control, communication, information and guidance to passengers if holding in arrival corridors due to extensive CBP processing times. GC-22
- All equipment will be designated with Terminal One logo. GC-22
- Terminal one management will conduct weekly inventory of equipment to make sure it is maintained "like new" and is in top operating condition. If equipment does not meet standards it will be replaced. GC-22
- Alstate will train its personnel in accordance with applicable standards and requirements, including those of the airline carriers. GC-22
- TOGA provides Alstate with Skycap/ Wheelchair service manager offices and common use of the locker room. GC-22
- TOGA can cancel contract for good cause with a 30-day notice. GC-22

ii. Carrier control over personnel decisions:

- TOGA can request that an employee not be assigned to account. Tr. 111-112
- Management team of Terminal usually approves what managers Alstate employs. Tr. 769.
- Several instances where the airlines or Terminal management will request termination of an employee and if you do not get rid of said employee they will be locked out of the swipe system. Tr. 771
- Terminals have requested employees be terminated a number of times, more times than the COO of Alstate cares to do. Tr. 775
- Alstate has to check with Terminal 1 and/or Terminal 4 prior to moving employees to either facility. Tr. 776, R-16
- Alstate had to get approval from Terminal 1 to temporarily move a manager to Terminal 4. Tr. 778-780 R-16, R-17.
- When Terminal management removes employee's access to swipe system they are unable to perform their job for Alstate. Tr. 785
- Baggage handler tried to solicit tip from airline passenger, airline carrier complained to Terminal and Terminal informed Alstate that they wanted that employee gone. Tr. 788, R-20
- Airline managers have the ability to discipline Alstate employees. Tr. 796

iii. Carriers and training:

- Training protocols are provided by airlines, terminal and port authority. Tr. 738
- Airline carriers pay for training. Tr. 738, 743
- Airline carriers requiring specific additional training for services provide to their specific airlines and/or airline carriers come out with new protocol that Alstate has to enforce. Tr. 740-743, R-10, R-13

iv. Carrier control over day-to-day operations:

- Alstate seeks over-time approval from TOGA. Tr. 94
- TOGA audits Alstate's invoices to verifying number of employees used and rates paid to Alstate on a monthly basis. Tr. 95, 100-101, 792
- The airlines contact Alstate directly on a day-to-day basis for how many employees are needed. Tr.103-104
- Alstate managers contact airline carriers daily to determine the need for skycap/Wheelchair services. Tr.106-107, GC-22
- Carriers inform Alstate of staffing changes and/or requirements. Tr 110
- Baggage handlers would get directives from airline representatives regarding oversized luggage, and would obey said directives from airline representatives, on a daily basis. Tr. 223-224
- Wheelchair agents go to airline carriers to ascertain where wheelchair is needed and/or the airline carriers inform the Skycaps or Wheelchair agents where to dispatch wheelchair. Tr.178, 196
- Wheelchair agents have daily communications with airline representatives, who direct them in their job duties. Tr.218-219

- Wheelchair agent would go on aircraft when passenger is disabled to help passenger disembark from airplane, wheelchair agent would be notified of said passenger by airline representative and airline representative would be with wheelchair agent as they assist passenger. This occurs approximately once a month. Tr. 241-242, 279, 297.
- Twice a day briefings in the terminals to determine the staffing requirements of Alstate, these briefings can increase to every hour on days where there is inclement weather. Tr. 744-745
- Alstate gets contacted directly by airline carriers on a daily basis for staffing requirements. Tr. 745
- Alstate employees must comply with the airline carrier's complaint resolution official on duty. Tr. 115-116
- Airline carrier has directed Skycap to perform duties of Wheelchair agent. Tr. 177
- Airline carriers can make specific additional work requests of Alstate and the airline carriers sign off on additional work-orders. Tr. 746-747, 749
- Alstate passenger service representatives have daily interactions with airline representatives, are directed by airline representatives and have to comply with those directives on a daily basis. Passenger service representatives are an extension of the airline representatives. Tr. 794-795

v. Meetings with carriers:

- Twice a day briefings in the terminals to determine the staffing requirements of Alstate, these briefings can increase to every hour on days where there is inclement weather. Tr. 744-745

vi. Carrier provided uniforms, equipment and supplies:

- Requiring Terminal 1 logo on baggage handler carts and wheelchairs. Tr. 108, 123, 199, 237, GC-22
- Skycap wearing a Terminal 1 logo sport coat. Tr. 119
- Ancillary service employees wear Terminal 1 logo sport coat. Tr. 120
- Skycap wears Terminal 1 vest, and it does not say Alstate anywhere. Tr. 197
- Alstate gets reimbursed for uniform expenses. Tr. 757, GC-56(a)
- Airline carrier required Alstate to use additional walkie-talkies and the airline reimbursed Alstate for that expense Tr. 758-759
- When Alstate first contracted for this work at Terminal 1, all the equipment was provided by Terminal 1. Tr. 759

b. Terminal 4:

i. Carrier control through contract:

- Alstate will supply personnel in sufficient number and at such times as required according to the individual airline flight schedules. GC-19

- TEFAC requires Alstate employees' uniforms to be in a clean tailored manner. GC-19
- If any personnel do not perform the intended services in a proper manner and satisfactory to TFAC and the contracting airlines, then, upon written notice from TFAC, Alstate must immediately remove any such personnel and replace them with satisfactory personnel. GC-19
- Alstate employees who are employed elsewhere at JFK must received prior approval from TFAC. Absent TFAC's approval, these employees must be removed from contract. GC-19
- TFAC has right to terminate contract "without cause" upon 60 days notice to Alstate. If Alstate fails to perform to the expected service levels agreed to between the tow parties, and it is not remedy, then contract can be terminated with 30-days notice. GC-19
- Alstate directly invoices airlines and the airlines pay Alstate directly. Tr. 51, GC-15
- Airlines are billed in accordance with the number of bags that are handled. Tr.52, GC-15
- Alstate will provide TFAC and airlines with monthly reports on staffing, quality controls, operational statistics and training. GC-19

ii. Carrier control over personnel decisions:

- Sole employee for TFAC testified that he is not aware that airlines have requested discipline of employees of Alstate at the same time he testified that he is often not brought into the communications between the airline carriers and Alstate. Tr. 65
- Alstate get contacted directly by airline carriers on a daily basis for staffing requirements. Tr. 745
- Management team of Terminal usually approves what managers are employed by Alstate. Tr. 769.
- Several instances where the airlines or terminal management will request termination of an employee and if you do not get rid of said employee they will be locked out of the swipe system. Tr. 771
- Terminals request employees be terminated a number of times more times than the COO of Alstate cares to do. Tr. 775
- Alstate has to check with Terminal 1 and/or Terminal 4 prior to moving employees to either facility. Tr. 776, R-16
- When Terminals remove employee's access to swipe system they are unable to perform their job. Tr. 785
- Airline managers have the ability to discipline Alstate employees. Tr. 796

iii. Carriers and training:

- Airline representatives at Terminal 4 performed the only training provided for the duties of baggage handler. Tr.202-203, 216
- Training protocols are provided by airlines, terminal and port authority. Tr. 738
- Airline carriers pay for training. Tr. 738, 743

- Airline carriers requiring specific additional training for services provide to their specific airlines and/or airline carriers come out with new protocol that Alstate has to enforce. Tr. 740-743, R-10, R-13

iv. Carrier control over day-to-day operations:

- Airline representatives would direct baggage handlers what to do with baggage. Tr. 205
- Terminals perform invoice audits on a monthly basis. Tr. 792
- Alstate baggage handlers have interactions with airline representative, are directed by airline representatives and have to comply with those directives on a daily basis. Tr. 795

v. Meetings with carriers:

- Airlines have frequent communications with Alstate; communications between the two parties do not solely go through TFAC. Tr.64
- Twice a day briefings in the terminals to determine the staffing requirements of Alstate, these briefings can increase to every hour on days where there is inclement weather. Tr. 744-745

vi. Carriers provide uniform, equipment and supplies:

- Delta airlines are providing Alstate with equipment. Tr. 71, GC-19
- TFAC supplies handheld scanners. Tr.60
- Alstate gets reimbursed for uniform expenses. Tr. 757
- Terminal 4 provides the baggage carts. Tr. 759

II. 10(b) STATUE OF LIMITATIONS:

The Union and the Employer had a card count for bargaining unit members working in Terminal 1 at JFK airport on August 2, 2012. JT-4. Wherein, a priest, Reverend Kevin McBrien, declared and certified that the union authorization cards supplied by the Union (102 valid cards), represented a majority of the employees in the bargaining unit at Terminal 1. JT-4.

Local 660 provided sufficient evidence that the bargaining unit members at Terminal 1 had direct knowledge that Local 660 was their exclusive collective bargaining representative. Three Terminal 1 employees testified that on August 9, 2012 they received notification, via a letter handed out by Union representatives where the employees for Terminal 1 report to work, notifying them that Local 660 was their exclusive collective bargaining representative. Tr. 597-599, 608, 612, 618-

619. Two of these employee witnesses further testified that many (90%) of the employees talked about how happy they were that the Union was now representing them. Tr. 605, 615. Furthermore, an employee witness testified that he had a copy of the GC-44 at home, and that "everybody got one." Tr. 622-623.

Two representative from Local 660 testified that they handed out GC-44, Union letter regarding representation, on August 9, 2012, and that they distributed approximately 200 copies with three other Union representatives. Tr. 583, 654, 663. A Union representative testified that he tried to get employees to become apart of the negotiating committee but that none of the employees wanted to be a part of the committee. Tr. 663-664. The August 9, 2012 letter was not produced in connection with a Board subpoena as evidence in a letter to General Counsel from counsel for Local 660 dated August 1, 2013. GC-44. The Union representative who drafted the August 9, 2012 letter, did so on his personal computer, and was only an employee of Local 660 until approximately July 2013. Tr. 650, 657.

The General Counsel and Charging Party elicited testimony from ten (10) - employee witnesses employed at Terminal 1 regarding the recognition of Local 660. Nine (9) of these witnesses testified that they did not hear and/or know about Local 660 until 2013 when dues where deducted from their paychecks. Tr.190-191, 249, 251-252, 308-309, 336, 366, 372, 467, 691, R-3. Of those nine (9) witnesses who testified that they did not hear and/or know about Local 660 until 2013, seven (7) of those witnesses had signed union authorization cards for Local 660 in July of 2012. Tr. 199-200, 251, 309, 347, 367, GC-7.

Furthermore, one of the General Counsel's employee witnesses recalled getting a card from a Local 660 representative in August of 2012, and then testified that he was informed of Local 660's representation in the summer of 2013, and in May of 2012, but consistently testified that he was aware of Local 660 representation in the summer. Tr 249-250, 264. Moreover, another one of General Counsel's employee witness testified that the Charging Party stopped organizing the employees around November/December of 2012 because Local 660 came in. Tr. 311-312. The Charging Party's own organizer knew about Local 660's campaign in July or August of 2012. Tr. 158. Not surprisingly, the organizer for the Charging testified that their campaign was not active in July and August of 2012, even though they had interest from several employees in Terminal 1. Tr.165, 166.

The three employee witnesses the General Counsel used to rebut the testimony that bargaining unit members received Local 660's August 9, 2012 letter informing the employees of recognition (GC-44), do not recall being at work on August 9, 2012. Tr. 696, 702-703, 713.

III. Majority of Members in Terminal 1 Bargaining Unit

As evidenced by the certified card count on August 2, 2012, Local 660 had valid Union authorization cards for 102 Terminal 1 bargaining unit members out of a possible 191 eligible employees. JT-4. Alstate provided the list of eligible employees to Local 660 on the day of the card count. R-8, Tr. 652.

IV. Local 660 Lawfully Requested Payment of Dues

The CBA, effective December 1, 2012, between the Employer and Local 660 contains a lawful union security provision. JT-3. This union-security provision

states that employees shall become and remain members in good standing of the Union within 31 days of employment and/or effective date of CBA. JT-3. The Union, via letter sent March 2013, three months after the effective date within the CBA, requested payment of dues. GC-28. The bargaining unit members were given notice of their *Beck Rights* by the Union's application for membership cards and the dues check off applications. JT- 6(a)&(b).

LEGAL ARGUMENT

A. The NMB has jurisdiction over this case not the NLRB

It is clear by the facts represented in this case that the National Mediation Board (hereinafter "NMB") has jurisdiction over this matter. "When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB applies a two-part test in determining whether the employer and its employees are subject to the Railway Labor Act (hereinafter "RLA")". *Menzies Aviation Inc.*, 42 NMB 1 (2014). First, the NMB will determine if the nature of the work performed by the employees in question is traditionally work performed by employees of rail or air carriers. The second function of the test is to determine if the employer is directly or indirectly owned, or controlled by, or under common control with, a carrier or carriers. *Airway Cleaners*, 41 NMB 262 (2014). Both parts of this test must be satisfied in order for NMB to assert jurisdiction. *Id.*

The facts in this case leave no doubt that the first portion of the jurisdictional test is satisfied. The current case law is clear that baggage handlers, wheelchair attendants, skycaps and passenger service agents are functions typically performed

by employees in the airline industry. *Command Security Corporation D/B/A Aviation Safeguards*, 27 NMB 581 (2000), *Primeflight Aviation Services Inc.*, 353 NLRB 467 (2008).

The question then becomes whether the airline carriers have direct or indirect control over Alstate's operations at JFK Airport. The facts in this case plainly establish that the airline carriers have significant control over Alstate. In a nearly identical case, involving baggage handlers, wheelchair attendants and skycaps at terminals 6 and 7 at JFK Airport, the NMB found that the employer was subject to the RLA. *Command Security Corporation D/B/A Aviation Safeguards*, 27 NMB 581 (2000). In that case, the employer had to tailor its service to meet any new requirements of the carriers, employees did not wear carrier uniforms, but the uniforms were agreed to by the carriers, carriers reserved right to demand removal of any employee, and carriers were able to audit employer records. *Id.*

All of those facts are present in this case. As detailed earlier, Alstate has daily directives on how many employees are needed for the various tasks (Tr. 103-104,110), the uniforms are agreed to and appearance is set in the contracts with the carriers (GC-19, GC-22), not only do that carriers have the right to demand removal of employees, but in fact the carriers have exercised that right (Tr. 11-112, 771,775,784-785, R-20, GC-19, GC-22) and the carriers audit the invoices of Alstate on a monthly basis (Tr.95, 100-101, 792). It would seem impossible for the Board to find that employees working at the same airport, performing the same job, with identical amount of carrier control over the employer be subject to different jurisdictions.

The General Counsel and the Charging Party are going to argue that the Employer is not subject to RLA because of *Menzies and Airway Cleaners*, where the Board found that the carriers did not have significant control over the employer. *Menzies Aviation Inc.*, 42 NMB 1 (2014), *Airway Cleaners*, 41 NMB 262 (2014). However, this case differs greatly from *Menzies*, because in that case the employer was not required to terminate employees who were unacceptable to the airline carriers and was able to transfer employees to another position. *Id.* "The NMB has found jurisdiction based on the authority to remove employees where an employee has been terminated following a carrier request that he or she be removed from the contract." *Id.*, *Aircraft Services Int'l*, 32 NMB 30 (2004). Moreover, in *Menzies*, the Board found that the carriers did not hire, fire or discipline any employees and the contract had provisions that explicitly left the decision of appropriate discipline to the employer.

Alstate has been told on more than one occasion to terminate an employee because the carriers did not want that employee working on their contract. Tr. 771, 775, 789, 785, R-20. Moreover, once the carriers indicate that they want a certain employee terminated Alstate has no option other than to comply. Tr. 771, 775, 789, 785, R-20. Not only do the carriers have the ability to terminate employees of Alstate, they have the ability to discipline and direct the employees, as well as, have the authority to determine how Alstate uses their own management team. Tr. 776, 778-780, R-16, R-17. Moreover, Alstate, once a carrier requests termination of employee does not then transfer that employee to another position. Tr. 771. If the carrier requests an employee to be terminated that employee is terminated. Alstate

employees are fortunate that the owners of Alstate own a similar entity that provides work for JFK airport known as Airway cleaners. Tr. 808, 811. Alstate can inform employees who Alstate believes are unfairly terminated based on carrier requests that they can apply for jobs at Airway Cleaners, a completely different entity with completely different jobs. Tr. 808, 811.

Board law repeatedly states that jurisdiction decisions are presented to the Board on a case-by-case basis and the Board may find that operations by the same employer at certain locations are covered under the RLA, while operations by the same employer at a different location are not. *Id.* Although, *Airway Cleaners* is a similarly owned and operated entity as Alstate, but they are two completely different entities with completely different job descriptions. The case of *Airway Cleaners* concerned employees who clean the Terminal and aircrafts. That case is completely different from the employees at Alstate who are baggage handlers, skycaps, wheelchair attendants and passenger service agents, whose day-to-day operations are directed and controlled by the airline carriers. *Airway Cleaners*, 41 NMB 262 (2014).

The NMB found jurisdiction over baggage handlers, wheelchair attendants, and skycaps, where, amongst other things, the contract set forth specific training requirements, employer leased office space from carrier, carrier conducted audit of employer's records, there were two incidents of carrier requesting termination of employees where the employer complied, employer attends daily briefing with carriers, and the employer must get written approval for overtime. *In the Matter of the Application of the Gateway Employee All. Alleging Representation Disputes*

Pursuant to Section 2, Ninth, of the Ry. Labor Act, As Amended Involving Employees of Gateway Frontline Servs., 42 NMB 146, 147 (June 4, 2015).

That case is very similar to this case because Alstate employees must comply with the directives of airline representatives on a daily basis (Tr. 103-104,110), the contract requires specific training (Tr. 202-203, 216, 738, 742-743, R-10, R-13, GC-19, GC-22), Alstate leases space from Terminal (Tr. 87, GC-25), Alstate's records are audited on a monthly basis (Tr. 95, 100-101, 792), there has been two specific incidents identified where Alstate terminated employees because carrier requested termination (Tr. 771, 775, 784-785, R-20), Alstate must get prior written approval for overtime (Tr. 746-747), and Alstate attends daily briefing with airline representatives (Tr. 744-745).

Furthermore, the Board found that skycaps, wheelchair agents, baggage handlers, and passenger service employees at LaGuardia Airport Central Terminal in Queens, New York to be covered by the RLA. *Primeflight Aviation Services*, 353 NLRB 467 (2008), *Primeflight Aviation Services*, 34 NMB 175 (2007). In *Primeflight*, carrier had direct and/or indirect control over the employer because carriers dictated the employers staffing level and regularly changed the daily assignments of the employer's employees based on the needs of the carriers, carriers communicated the staffing requirements to the employer, employer met twice a week with carrier, carrier dictated the type of training the employer's employees received, carrier provided space to train employees, carrier trained one employer employee to train the rest of the employees, wage levels are constrained by specific per hour price paid by the carriers, carriers have right to remove employee from

contract, carriers approve uniforms, some employees wear airline uniforms, and carrier provides employer's equipment.

Alstate's operations are similar to those in *Primeflight*. *Id.* Alstate's contract dictates the required training (GC-19, GC-22), in certain instances the carrier performs training (Tr. 202-203, 216), carriers have right to remove employee from contract (Tr. 771, 775, 784-785, R-20, GC-19, GC-20), carrier approves uniform in contract (GC- 19, GC-22), some employees wear Terminal 1 logo uniforms, certain instances carrier provides equipment (Tr. 71,108,119, 123,120, 197, 759, GC-19, GC-22).

For the above-mentioned reasons the airline carriers have sufficient control, directly or indirectly over Alstate's operation, to satisfy the jurisdictional test. Therefore, Alstate and the bargaining unit members are subject to the RLA and under the jurisdiction of the NMB.

B. The first charge is subject to 10(b) and should be dismissed

Section 10(b) of the National Labor Relations Act states that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The 10(b) period begins to run when the charging party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). The party asserting the 10(b) defense has the burden of showing actual or constructive notice. *Nursing Center at Vineland*, *supra*; *Carrier Corp.*, 319

NLRB 184, 190 (1995); *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. 1995).

Local 660 has established that the bargaining unit members at Terminal 1 had actual notice that Local 660 was their exclusive collective bargaining representative on August 9, 2012 only a few days after the certified card count on August 2, 2012. JT-4, GC-44. Several bargaining unit employees' testimony established that Union representative informed them of Local 660 representation on August 9, 2012. Tr. 597-599, 608, 612, 618-619. Furthermore, most of the testimony obtained by the General Counsel and the Charging party where employees testified that they first heard of Local 660 in February of 2013 was impeached by the fact that they signed union authorization cards for Local 660 in July 2012. Tr. 199-200, 251, 309, 347, 367, GC-7.

Moreover, notice, may be found even in the absence of actual notice if a charging party has failed to exercise reasonable diligence, i.e., the 10(b) period commences running when the charging party either knows of the unfair labor practice or would have "discovered" it in the exercise of "reasonable diligence." *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), *enfd.* *mem. sub nom. Gilmore Steel Corp. v. NLRB*, 134 LRRM 2432 (9th Cir. 1989), *cert. denied* 496 U.S. 925 (1990). *M & M Automotive Group, Inc.*, 342 NLRB 1244, 1246 (2004). *See also NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1317 (11th Cir.1999).

Even if the General Counsel and Charging Party allege that somehow there was no actual notice of Local 660's representation to the bargaining unit members of Terminal 1 in August 2012, they could have discovered Local 660's representation

through “reasonable diligence”. As noted in the record, the Charging Party was campaigning for the same Terminal 1 employees as Local 660. Tr. 165-166. Moreover, one of General Counsel’s and Charging Party’s employee witness testified that the Charging Party stopped organizing the employees around November/December of 2012 because Local 660 came in. Tr. 311-312.

The General Counsel is going to attack the validity of the August 9, 2012 letter and assert that this letter was not produced in connection to subpoena as evidence in a letter to General Counsel from counsel for Local 660 dated August 1, 2013. GC-44. However, the Union representative who drafted the August 9, 2012 letter, did so on his personal computer, and was only an employee of Local 660 until approximately July 2013. Tr. 650, 657. One of the many reasons Congress has enacted the 10(b) statute of limitations is “to bar litigation over past events, after records have been destroyed, witnesses have gone elsewhere and recollection of the events in question have become dim and confused. *Local Lodge No. 1424 v. N. L. R. B.*, 362 U.S. 411, 80 S. Ct. 822, 4 L. Ed. 2d 832 (1960), *citing* H.R.Rep.No. 245, 80th Cong., 1st Sess., p.40. The response to the Board’s subpoena came after the individual who wrote the August 9, 2012 letter was no longer employed by Local 660.

C. Majority support of Terminal 1

The General Counsel attempts to show through various exhibits and testimony that Local 660 did not have a majority of union authorization cards of the bargaining unit members of Terminal 1 on August 2, 2012. However, all of this evidence should

be disregarded as it relates to an event that it outside the 6-month period from when the charge was filed on April 25, 2013. Even if Local 660 did not represent a majority of the bargaining unit members at Terminal 1 on August 2, 2012, "the legislative history contains affirmative evidence that Congress was specifically advertent to the problem of agreements with minority unions, had previously been at pains to protect such agreements from belated attack and manifested an intention, in enacting 10(b), not to withdraw that protection." *Local Lodge No. 1424 v. N. L. R. B.*, 362 U.S. 411, 80 S. Ct. 822, 4 L. Ed. 2d 832 (1960). The earliest date the General Counsel can look back to is October 25, 2012 and the authorization card count was held and certified by a Reverend on August 2, 2012.

Even if the Board finds that Local 660 did not provide enough evidence to satisfy the burden of proof that the first charge falls beyond the 10(b) period, Local 660 did have majority support of Terminal 1 bargaining unit members on August 2, 2012. As established in the card check authorization, Local 660 had 102 valid authorization cards out of 191 eligible employees. JT-4. The card count was certified by a Reverend Kevin McBrien, who checked the 102 union authorization cards against the payroll records of Alstate Maintenance to verify the card count. JT-4.

In an effort to invalidate Local 660's majority card count of Terminal 1 bargaining unit employees, General Counsel introduced evidence of employees who where hired and/or terminated on the day of the card count. GC-52, GC-53, GC-54. However, even in Board run elections typically the employees eligible to vote are those who are employed on the payroll date preceding the election. Moreover, the

employee list used for the card count was distributed to the Union from the Employer at the card count on August 2, 2012. R-8, Tr. 652. Board law states, that since employer recognition of a minority union is a violation of the Act, there is a presumption that a union recognized by an employer does, in fact, represent a majority of the workers in the unit. *See, e.g., NLRB v. Roger's I.G.A.*, 605 F.2d 1164, 1165 (10th Cir.1979) (citing *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir.1973).

D. Local 660's lawful dues request:

The General Counsel alleges that Local 660 unlawfully requested payment of dues via a letter sent March 2014, which requested payment of dues for bargaining unit members. GC-28. However, this payment of dues request letter was sent out three months after the parties entered into the CBA. JT-3. Contained within the CBA is a valid union-security provision, which states that the employees shall become and remain members in good standing of the Union within 31 days of employment and/or the effective date of CBA. JT-3. It is clear that March 2013, is more than 31 days after the effective date, December 1, 2012, of the CBA. The General Counsel alleges that bargaining unit members were not given notice of their *Beck Rights*. However, this language is found in Local 660's application for membership and dues check off applications, which was provided to employees. JT-6(a)&(b). Furthermore, there was testimony from an employee that a Union representative indicated that sending the dues request letter was a mistake, and that the employee

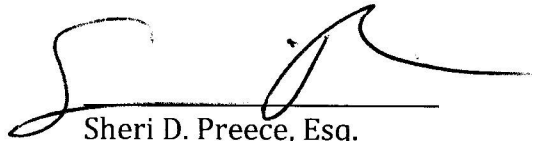
did not owe dues. Tr. 384. Furthermore, none of the bargaining unit members where terminated based on the dues request letter. Tr.384.

CONCLUSION

Alstate is an employer whose employees perform work typically performed by airline carriers and the airline carriers Alstate has contracted work for are in direct and/or indirect control of Alstate, therefore Alstate is subject to the Railway Labor Act and is under the Jurisdiction of the National Mediation Board, not the National Labor Relations Board. Moreover, the first charge the Board issued this complaint on is based on alleged violations that are outside the six (6) months statute of limitations, and based on a valid recognition agreement and as a result should be dismissed outright. For all the various reasons detailed above, the complaint against Local 660, United Workers of America, should be dismissed in its entirety.

Dated March 25, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sheri D. Preece', is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of March 2016, Local 660 United Workers of America, served a true copy of the Local 660 United Workers of America Post Hearing Brief to the follow:

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Division of Judges

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A handwritten signature in black ink, appearing to read 'Sheri D. Preece', is written over a horizontal line.

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